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SUPREME COURT U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81 6224

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ROBERT FRANKLIN GODFREY, Petitioner

v.

STATE OF GEORGIA, Respondent

---

# PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

---

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RAGERASE BOND
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WATERMARK BOND
SOUTHWORTH CO. U.S.A.
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IN THE

SUPREME COURT OF THE UNITED STATES

February, 1982

October Term, 1981

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ROBERT FRANKLIN GODFREY, Petitioner

v.

STATE OF GEORGIA, Respondent

---

# PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

---

Petitioner prays that a Writ of Certiorari issue to review the Judgment of the Supreme Court of Georgia, which was decided November 21, 1981, and the Motion for Rehearing was denied December 16, 1981.

## CITATION TO OPINION BELOW

The opinion of the Supreme Court of Georgia is reported in Godfrey V. State, 248 Georgia 616 (1981),and is set out in Appendix A hereto, pp A-1 through 18.

## JURISDICTION

The judgment of the Supreme Court of the State of Georgia was final on December 16, 1981 and is set out in Appendix A hereto. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the United States Constitution and the Georgia Statutes are set out in Appendix E.

## QUESTIONS PRESENTED

1. (a) Whether the resentencing to death of the Petitioner after reversal in this Court on the ground that, as a matter of constitutional construction, the evidence was sufficient in the first trial to support the death sentence under Section (b)(7), the only aggravating circumstance submitted to the first jury, violated the double jeopardy clause?

(b) Is the double jeopardy clause also violated when the State specifically waived and forfeited any other aggravating circumstance except Section (b)(7), including (b)(2), in the first trial and the Court impliedly acquitted the petitioner of any other such aggravating circumstances in light of the mandatory terminology of the sentencing statute requiring that they be submitted and other aspects of Georgia Criminal Procedure?

2. Do the second death sentences violate the due process clause in theEighth and Fourteenth Amendments when, under the circumstances of this case, there was no statutory authority for a remand for a resentencing trial and where other Georgia statutory procedures were ignored?

3. Is Georgia Code Annotated Section 27-2534.1(b)(2), as applied to the facts of this case, unconstitutionally vague and overbroad in violation of the Fifth, Eighth and Fourteenth Amendments to the United States Constitution?

4. Was the Charge of the Court, as a whole, constitutionally deficient under the Fifth, Sixth, Eighth andFourteenth Amendments where it provided no narrowing definition of the Statute nor any guidelines meaningful to a jury as to mitigating circumstances, what they are in contemplation of the law, and what weight they are to be given?

5. Was the jury's consideration of mitigating circumstances unconstitutionally restricted because the Court excluded the evidence intended to demonstrate the rarity of death sentences in domestic murders?

6. Did the trial Court's unreasonable restriction of the voir dire of Petitioner's counsel concerning the jurors' personal bias or predisposition toward the death penalty, after the jurors had been death qualified pursuant to Witherspoon, violate the Constitution of the United States?

7. Is the death sentence against the Petitioner, when considering all of the factors, background and mitigating circumstances involved in the case, so disproportionate, arbitrary and unusual as to violate the Eighth and Fourteenth Amendments to the United States Constitution?

## HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED

Each of the questions presented herein were raised prior to trial by Motion or during trial and were argued in the Georgia Supreme Court as violations of the United States Constitution. The Georgia Supreme Court decided all questions either directly, or implicitedly, on such federal constitutional grounds. Therefore, there is no necessity for fuller treatment since no jurisdictional question is presented in relation to any of the Petitioner's arguments.

BASERASE-BJN

## STATEMENT OF THE CASE

The Defendant, ROBERT FRANKLIN GODFREY, was indicted for the murders of his wife, Mildred Godfrey, and mother-in-law, Chessie Wilkerson, and the aggravated assault upon his young daughter, Tracy, by the Grand Jury of Polk County on December 15, 1977, wherein it was alleged that the offenses were committed by him on September 20, 1977.

On March 9, 1978, the jury brought back guilty verdicts on all counts of the Indictment. Upon the sentencing stage, the jury fixed punishment at death and designated as the aggravating circumstance or circumstances:

> " That the offense of murder was outrageously or wantonly vile, horrible and inhuman."

The only aggravating circumstance submitted to the jury was Georgia Code Annotated Section 27-2534.1(b)(7).

On Monday, March 13, 1978, the Court sentenced Robert Franklin Godfrey to death by electrocution and set the date at April 14, 1978 at 11:00 o'clock, A.M., and gave the defendant ten years to serve on the aggravated assault conviction.

A Motion for New Trial was denied by the trial court. Notice of Appeal was filed and Defendant's case was argued in the Georgia Supreme Court on November 20, 1978. The convictions and sentences were affirmed. Rehearing was denied on March 27, 1979.

Application for Writ of Certiorari was filed before the United States Supreme Court, wherein the Defendant alleged that the Georgia Supreme Court in affirming the death sentences in Godfrey v. State, 243 Georgia 302, had adopted such a broad and vague construction of Georgia Code Annotated Section 27-2534.1 (b)(7) so as to violate rights protected by the Eighth and

Fourteenth Amendments to the United States Constitution. Certiorari was granted in October, 1979, and oral arguments were heard in the United States Supreme Court in February, 1980.

On May 19, 1980, the United States Supreme Court filed its opinion Godfrey v. Georgia, 446 U.S. 420, 100 S. Ct. 1759, wherein the judgment was reversed insofar as it left the death sentences standing and was remanded to the Court for further proceedings.

On September 8, 1980, the Georgia Supreme Court remanded the case to the Superior Court of Polk County for either the imposition of a life sentence or a resentencing trial under any aggravating circumstance other than Georgia Code Annotated Section 27-2534.1(b)(7). The Defendant filed a Motion for Rehearing on September 18, 1980, which was denied by the Georgia Supreme Court on September 20, 1980. The Defendant was informed by the District Attorney's office on November 4, 1980, that the State would again seek the imposition of two death sentences this time under Georgia Code Annotated Section 27-2534.1(b)(2).

The issues of double jeopardy, due process and Eighth Amendment violations were raised in the Motion for Rehearing before the Georgia Supreme Court and in the Motion to Impose a a Life Sentence and Plea of Former Jeopardy, etc., in the trial Court. Both of said pretrial Motions were denied. The Court declined to certify the denial of said pretrial Motions for immediate review. A Motion to Enjoin the State from proceeding with a resentencing trial on Georgia Code Annotated Section 27-2534.1(b)(2) was filed on October 24, 1980, and denied on the same date. A Notice of Appeal was timely filed on November 3, 1980 and on the same date a Motion for Continuance was filed by the Defendant in the trial court setting out that a Notice of Appeal had been filed. On November 20, 1980, the

jury fixed the punishment at death as to both counts and as to Count One designated the aggravating circumstance or circumstances as follows:

> " That the offense of murder was committed while the offender was engaged in the commission of another capital felony, namely the murder of Chessie Wilkerson."

As to Count Two the jury found the aggravating circumstance or circumstances as follows:

> " That the offense of murder was committed while the offender was engaged in the commission of another capital felony, namely the murder of Mildred Godfrey."

The Court sentenced the Defendant to death by electrocution and set the date at December 5, 1980. Notice of Appeal was timely filed with this Court.

The evidence adduced at the resentencing trial was essentially the same as that presented during the first trial.

The Defendant had a previous history of confinement at the Central State Mental Hospital in Milledgeville, Georgia. He had been at Central State in 1950, 1966 and 1971, and once at the Veterans' Administration facility in Murfreesboro, Tennessee. (Tr. 446, 572) These confinements were due to a drinking problem, connected with depression and violent episodes with his wife. (Tr. 546, 547). With the exception of the first proceeding when he was confined pursuant to a committment proceeding initiated by his wife and mother-in-law, Godfrey endured these confinements voluntarily so that his wife would take him back, and he and his wife were always reconciled after these confinements. (Tr. 433, 446, 546) The Defendant had also undergone treatment in the mid-sixties and was hospitalized in Rome under the care of a psychiatrist, Dr. William S. Davis. (Tr. 435, 436, 546).

The Defendant had been employed for approximately 25 years, with two short breaks, at the Northwest Georgia Regional Hospital in Rome. In the earlier years, Godfrey served as a surgical nurse and in recent years his duties involved post-operative care and routine duties on the ward. For nine of those years, the Defendant worked a second job at Floyd Hospital in Rome, his duties consisting primarily of the treatment of trauma patients in the Emergency Room. (Tr. 425,441)

Three co-workers, Head Nurse and Supervisor, Mrs. Jean Lebkicker; Chief Surgeon, Dr. Joseph Lynn; and Lead Nurse of the Child and Adolescent Unit, Ms. Martha Mayfield, testified as to the character of the Defendant. Mrs. Lebkicker and Dr. Lynn testified to his good, reliable honest character based upon working with him for over twenty years, as believably, very good and reliable at work, and particularly gentle with patients and especially children. (Tr. 514-516, 509, 510).

The Defendant served two tours of duty in the service, the first in the Army Air Corps and the second in the Marines. Much of that time he served as a combat medic with a paratrooper rescue unit. (Tr. 421-424). He received a stomach wound during the Korean Conflict and as a result of those injuries received a service-connected disability rating. (Tr. 429) The Defendant suffers from extreme hypertension and is a diabetic who cannot tolerate insulin. (Tr. 444-445)

In 1976, the Defendant ran as Chief Deputy Sheriff with the losing candidate in the Sheriff's race in Polk County. John Redding, who served as Sheriff of Polk County for sixteen years and had known the Defendant all his life, also testified as to the honesty and truthfulness of the Defendant and his good reputation in the community. (Tr. 504-506).

The Defendant received various medals and citations during his service with the military. (Tr. 477).

On September 5, 1977, the Defendant got into an allegedly violent argument with his wife and pulled a knife on her. His wife then left him and stayed with relatives for a short time thereafter moving in with her mother. (Tr. 332) Her mother lived in a trailer approximately 200 yards downhill from the Defendant's house. The trailer was situated next to a nephew's trailer and in the backyard of a house on the main road where the Defendant's married daughter lived. The Defendant's house was at the end of a long driveway going in near the house and trailers and winding up through some trees onto a hill. During the separation, the Defendant talked with his wife on three occasions briefly but she would not agree to move back home. (Tr. 334, 460)

Then Mrs. Godfrey had divorce papers served upon the Defendant in which she asked the Court to award all the property and their minor daughter to her. Mr. Godfrey did not consult with a lawyer. The hearing upon the divorce was set for September 22, 1977. (Tr. 453, 457). Throughout the separation, Mr. Godfrey was very anxious to reconcile with his wife as had always occurred in the past. (Tr. 458, 549)

On September 20, 1977, the Defendant went to work as usual and performed his normal duties throughout the day at the hospital in a normal manner. He was called sometime during the day by his mother-in-law and told that his wife wanted to talk with him by telephone that evening. This led the Defendant to hope that their differences would be resolved. The Defendant got home around 4:00 o'clock, P.M., and fixed himself something to eat. Mrs. Godfrey called him around 5:00 to 5:30 o'clock, P.M., they argued, and she would not agree to reconcile with Godfrey and stated that she wanted all the property as well. Mrs. Godfrey hung up after saying she would call back later. The Defendant testified that he was extremely depressed by this. (Tr. 466-469, 550, 551)

Mrs. Godfrey called back later, approximately 7:30 o'clock, P.M. This second conversation was more heated and Mrs. Godfrey ended the call with a final rejection of defendant's attempt to save the marriage and by again telling the defendant that she wanted all the property and would see him in court. Upon hanging up the telephone the defendant testified that he has never in his life experienced such a low feeling, as if kicked in the stomach, and then he blacked out and has no further memory of the subsequent events until the following day when he waked up in the Polk County Jail. (Tr. 469, 471, 551)

The evidence, through various witnesses, established that the defendant, at some time shortly after the second telephone call, got his single shot 20 guage shotgun and walked down the hill to his mother-in-law's trailer where Mrs. Godfrey, Mrs. Wilkerson, the mother-in-law, and the defendant's 12 year old daughter were seated around a table playing cards. The Defendant then shot his wife through the window in the forehead killing her instantly and proceeded into the trailer and hit his daughter on the head with the gun as she ran out towards the married daughter's house. Godfrey then shot his mother-in-law in the head with one shotgun blast killing her instantly. The defendant then called the Polk County Sheriff's office and told the dispatcher, after identifying himself in a clam voice, to tell the Sheriff that he had just blown his wife's and mother-in-law's heads off and to come and get him. (Tr. 347)

The Defendant then went outside into the yard and placed the shotgun in the branches of an apple tree. Then he went toward his married daughter's house near the road and sat down in a chair under a shade tree to wait for the police. When the police arrived he told him "they're dead, it's all over with", and showed one officer where the gun was placed in the tree. He was described by all of the officers as very calm looking, steady on his feet, with no odor of intoxicants on

his breath, and it was all of the officers' opinion that he was definitely not intoxicated. (Tr. 355-358) Concerning his mental state at the time of the shootings, it is significant to note that all of his previous history of violence was associated with every heavy intoxication, whereas, on this occasion he had not had anything to drink, and had not been drinking for some time prior to the killings in an attempt to help reconcile his marriage. (Tr. 464)

Later at the Polk County Police station, according to one officer with whom he was left along momentarily, and who neither made a tape recording nor written statement, nor asked the amazingly loquacious defendant to repeat it in company, the Defendant allegedly told this particular officer that he had done a hideous thing, had thought about it for a long time, and would do it again. (Tr. 383)

At the first trial the same officer testified that the Defendant told this officer that he had done a "heinous" crime. (Tr. 239)

At the trial, the defense marshalled testimony relative to the Defendant's mental state at the time of the shootings. Dr. William S. Davis, a highly qualified psychiatrist who is on the clinical teaching staff at Emory Medical School, Past President of the Georgia Psychiatrists Association, and retained by United States District Court Judge William O'Kelley to observe defendants on two occasions in his courtroom, testified that in his opinion the second telephone conversation with his wife, created such an emotional trauma and provocation that it caused the Defendant to go into an altered state of consciousness described by Dr. Davis as a dissociative reaction, as evidenced by the blackout of memory and the Defendant's previous history of blackouts. (Tr. 545-551, 555) Dr. Davis further testified that in this state the Defendant's conscious will could not

control his subconscious impulses and resulting acts. (Tr. 554-556) Dr. Davis had seen and treated the Defendant in the mid-sixties in Rome when Dr. Davis was with the Harbin Clinic and had also seen him on two occasions, pursuant to court order in the month prior to the first trial, and once shortly before the resentencing trial.

The second visit to Dr. Davis' office at Peachtree Parkwood Mental Hospital, where he is Chief of Staff, was specifically for a sodium amytal (propularly known as truth serum) interview to determine, among other things, the Defendant's truthfulness concerning the loss of memory and the emotional trauma he felt at the recognition that he would not, finally, be able to once again save his marriage. (Tr. 552)

The Defendant again received two death sentences. The sentences were affirmed in part, with one being vacated, in the Georgia Supreme Court in Godfrey v. State, 248 Georgia 616 dated November 21, 1981. A Motion for Rehearing was denied on December 16, 1981.

## REASONS WHY WRIT SHOULD BE GRANTED

1.

[A.]

The resentencing to death of the Petitioner, after reversal in this Court on the ground that, as a matter of constitutional construction, the evidence was insufficient in the first trial to support a death sentence under GCA Section 27-2534.1(b)(7), the only aggravating circumstance submitted, violated the double jeopardy clause.

This case was previously before this Honorable Court and the death sentences against the Petitioner were vacated and the case remanded to the Georgia Supreme Court for further proceedings. Godfrey V. Georgia, 446 U.S. 420, 100 S. Ct. 1759 (1980). The Georgia Supreme Court then remanded the case back to the Superior Court of Polk County for entry of a life sentence or for a resentencing trial under any aggravating circumstance other than GCA Section 27-2534.1(b)(7), which was the only aggravating circumstance submitted to the jury in the first trial. Godfrey V. State, 246 Georgia 359, 274 SE2d 339 (1980). The trial Judge subsequently overruled Motions to impose life sentences brought on the grounds that death sentences would be inappropriate, unjust and arbitrary and would violate double jeopardy clause. The case proceeded on for a resentencing trial under Georgia Code Annotated Section 27-2534.1(b)(2), i.e., that the murders occurred while the offender was engaged in the commission of another capital felony, to-wit: murder, and the Petitioner received death sentences on both counts again. The Georgia Supreme Court, while rejecting Petitioner's double jeopardy arguments, did vacate the death sentence on the murder of Mildred Godfrey, leaving standing the death sentence in the murder of Mrs. Wilkerson, the mother-in-law, on the grounds that the two aggravating circumstances were "mutually supporting" and that one must be arbitrarily eliminated.

The Petitioner's argument, in brief, presented to the Georgia Supreme Court, is that Bullington V. Missouri, 101 S. Ct. 1852 (1981) controls the analysis of double jeopardy questions in Georgia as well as Missouri because the Statutes are for all practical purposes identical; and that further, the reversal in Godfrey V. Georgia, supra, comes

within the exception recognized in Burks V. United States, 437 U.S. 1, 98 S. Ct. 2141, 57 LE2d 1 (1978), and the State was therefore barred from reprosecuting, or subjecting the Petitioner to a resentencing trial placing his life in jeopardy again.

Of course the general rule in such matters, as stated in North Carolina V. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 LE2d 656 (1969), is that there is no double jeopardy bar to retrying a defendant who has succeeded in overturning his conviction. However, as this Court reaffirmed in Bullington V. Missouri, supra, at Page 1860, there is an important exception to this rule:

> "A defendant may not be retried if he obtains a reversal of his conviction on the ground that the evidence was insufficient to convict. Burks V. United States, 437 U.S. 1, 98 S. Ct. 2141, 57 LE2d 1 (1978). The reasons for this exception are relevant here:
>
> > 'Reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its cases. As such it implies nothing with respect to the guilt or innocence of the defendant....'
> >
> > 'Some cannot be said when a defendant's conviction has been overturned due to a failure of proof at trial, in which case the prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it can assemble.... Since we necessarily accord absolute finality to a jury's verdict of acquittal - no matter how erroneous its decision - it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty.' Id., at 15-16, 98 S. Ct., at 2149-2150."

The Petitioner urges this Court, and argued in the Georgia Supreme Court, that this Court's decision in Godfrey V. Georgia brings this case within the exception in Burks because the rationale in that case rested ultimately upon facts and evidence and whether it satisfied a constitutional criteria required to support a finding of the aggravating circumstance in the first trial, Section (b)(7). This Court held that Section (b)(7), to pass constitutional muster, can be applied only where the evidence shows serious physical injury, i.e. torture or aggravated battery prior to the death of the victim. As this Court held:

> "The circumstances of this case, therefore, do not satisfy the criteria laid out by the Georgia Supreme Court itself in the Harris and Blake cases.....
>
> Thus, the validity of the petitioner's death sentences turns on whether, in light of the facts and circumstances of the murders that Godfrey was convicted of committing, the Georgia Supreme Court can be said to have applied a constitutional construction of the phrase 'outrageously or wantonly vile, horrible or inhuman in that they involve .....depravity of mind.....'. We conclude that the answer must be no. The petitioner's crimes can not be said to have reflected a consciousness materially more 'depraved' than that of any person guilty of murder.....
>
> .....There is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not. Accordingly, the judgment of the Georgia Supreme Court insofar as it leaves standing the petitioner's death sentences is reversed, and the case is remanded to that Court for further proceedings." Godfrey V. Georgia, 100 S. Ct. at 1767.

Therefore, Petitioner submits that since his first death sentences were reversed on the grounds that the evidence was insufficient to support a constitutional construction of Section (b)(7), and where it was the only aggravating circumstance submitted in the first trial, the double jeopardy clause bars a resentencing trial under Section (b)(7) or any other aggravating circumstance. Bullington V. Missouri, supra. To avoid the logic of this position, the Georgia Supreme Court simply construed Godfrey V. Georgia in such a way as to take it out of the Burks exception. This was accomplished by that Court holding that Godfrey did not involve a sufficiency of evidence problem but was reversed solely upon legal grounds:

> "The reversal in Godfrey V. Georgia, supra, was based on the premise that the Supreme Court of Georgia, in affirming a death sentence based on no more than a finding that the offense was outrageously or wantonly vile, horrible and inhuman, had allowed a standardless and unchanneled imposition of the death penalty 'in the uncontrolled discretion of a basically uninstructed jury.' Godfrey V. Georgia, supra, at 429.....
>
> The reversal here being solely upon legal grounds, Godfrey V. Georgia, supra, a retrial would not be for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.
>
> .....in this case the trial defect was an incomplete verdict." Godfrey V. State, decided November 24, 1981, slip op. pp. 4-5.

In adopting this construction of Godfrey V. Georgia, the Georgia Supreme Court also ignored Georgia Code Annotated Section 26-507(d)(2) which states as follows:

> "A prosecution is not barred within the meaning of this Section.....(2) if subsequent proceedings resulted in the invalidation, setting aside, reversing or vacating the conviction, unless the accused was thereby adjudged not guilty or unless there was a finding that the evidence did not authorize the verdict." (Emphasis supplied by counsel)

Justice Hill, in his dissent to Godfrey II, pointed out the fallacy of the majority's reasoning:

> "Reading the double jeopardy clause, Godfrey has been 'subject for the same offense to be twice put into jeopardy of life'. There is, of course, an exception where the defendant obtains a retrial based upon trial error (as opposed to insufficiency of the evidence). The majority sees the defect in the defendant's first trial as an incomplete verdict. That incomplete verdict resulted from the jury's failure to find depravity of mind of the defendant. That is, the jury found no evidence of depravity of mind. Thus, double jeopardy applies."

This recent construction of Godfrey V. Georgia, by the Georgia Supreme Court in Godfrey V. State, decided November 24, 1981, is also decidedly inconsistent with the first constructions of Godfrey V. Georgia made immediately after that decision in June, 1980, and in numerous cases since that time applying Godfrey V. Georgia as a part of the sentence review. In Hance V. State, 245 Georgia 856, decided June 24, 1980, that Court explained its definitive construction and interpretation of Godfrey V. Georgia:

> "Recently the United States Supreme Court has considered this Section as applied to a specific factual situation. Godfrey V. Georgia, 48 U.S. L. W. 4541 (1980). In Godfrey V. Georgia, it was held that Code Annotated Section 27-2534.1 (b)(7), although constitutional, was unconstitutionally applied under the specific facts of that case. The order for Code Annotated Section 27-2534.1(b) to be constitutionally applied in a given case, we hold that the evidence presented at trial must satisfy the following criteria as they apply to the specific factual situation of each case.....
>
> This statutory aggravating circumstance consists of two major components, the second of which has three sub-parts, as follows: (I) The offense of murder was outrageously or wantonly vile, horrible or inhuman (II) In that it involved (A) aggravated battery to the victim, (B) torture to the victim, or (C) depravity of mind of the defendant. In determining 'whether....the evidence supports the jury's or judge's finding of this statutory aggravating circumstance .....' Section 27-2537(c)(2), the evidence must be sufficient to satisfy the first major component of the statutory aggravating circumstance and at least one sub-part

Hance, at pp. 860-862.

That this was the Georgia court's definitive construction of Godfrey V. Georgia was confirmed subsequently in Justus V. State, 247 Georgia 276 at 279 (1981), where the Court by way of introduction to its sentence review portion of its decision stated that "it must be reviewed in light of the U.S. Supreme Court's decision in Godfrey V. Georgia, 446 U.S. 420....., as construed by this Court in Hance V. State, 245 Georgia 856, 268 SE2d 339 (1980)." In these cases and numerous others that were remanded for reconsideration in light of Godfrey or have subsequently come to the Georgia Supreme Court on appeal applied and analyzed the Godfrey decision and distinguished the facts in those cases reviewed and upheld from the facts in Godfrey. See Fair V. State, 245 Georgia 868, 879-881; Mulligan V. State, 245 Georgia 266, addendum (added after Godfrey V. Georgia decided) 245 Georgia 881; Dampier V. State, 245 Georgia 427, addendum at 681; Baker V. State, 246 Georgia 259, addendum to 243 Georgia 710, vacated and remanded for consideration in light of Godfrey, 100 S. Ct. 2936; Collins V. State, 246 Georgia 261, on remand, 100 S. Ct. 2936; Brook V. State, 246 Georgia 262, on remand 100 S. Ct. 2937; Hamilton V. State, 246 Georgia 264, on remand 100 S. Ct. 2936; Hill V. State, 246 Georgia 402, 409-410; Davis V. State and Spraggins V. State, 246 Georgia 432, on remand 100 S. Ct. 2934-35; Cape V. State, 246 Georgia 520, 527 (1980); Greene V. State, 246 Georgia 598, 606 (1980); Tyler V. State, 247 Georgia 119, 124-125 (1981); Patrick V. State, 247 Georgia 168 (1981), vacated and remanded Patrick V. Georgia, 101 S. Ct. 522; Strickland V. State, 247 Georgia 219, 231-232 (1981); Thomas V. State, 247 Georgia 219 (1981), vacated in light of Godfrey U.S. S. Ct., November 17, 1980; Hardy V. State, 247 Georgia 35 (1981), vacated U.S. S. Ct., November 17, 1980; High V. State, 247 Georgia 289, 296 (1981); Brown V. State, 247 Georgia 298, 299 (1981); Messer V. State, 247 Georgia 316, 326 (1981); Stevens V. State, 247 Georgia 698, 709; Gilreath V. State, 247 Georgia 814, 835-39.

As the dissent points out, the Georgia Supreme Court recognizes that the rationale of Bullington V. Missouri, extends the Fifth Amendment's double jeopardy principles to the bifurcated Capital Sentencing Scheme of the Georgia Statute since it is practically the same as the Missouri Statute which was based upon the Georgia

Bullington case is that in the one a jury acquitted Bullington of a death sentence by finding for a life sentence in his first trial whereas in Godfrey, this Court decided that the evidence was insufficient, as a matter of constitutional law, in his first trial to support the death sentences under Section (b)(7). The Bullington case, however, grants equal footing to both situations:

> "Thus, the 'clean slate' rationale recognized in Pearce is inapplicable whenever a jury agrees or an Appellate Court decides that the prosecution has not proved its case." Bullington, 101 S. Ct. at 1860.

Therefore, Petitioner respectfully submits that his death sentences in the second resentencing trial violate the double jeopardy clause in the United States Constitution and should be vacated.

[ B.]

The double jeopardy clause is also violated when the State specificially waived and forfeited any other aggravating circumstance except (b)(7) in the first trial and the trial Court impliedly acquitted the Petitioner under the mandatory terms of the Statute and Georgia Criminal Procedure.

As noted above, in the first trial of this case, at the sentencing portion, only the Section (b)(7) aggravating circumstance was charged to the jury. However, Petitioner submits that it was absolutely mandatory under the Georgia Statute that any and all other statutory aggravating circumstances which may have been supported by the evidence were required to be submitted. Georgia Code Annotated Section 27-2534.1(b) states in pertinent part as follows:

> "In all cases of other offenses for which the death penalty may be authorized, the Judge.....shall include in his instructions to the jury for it to consider any mitigating circumstance or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:" (Emphasis supplied by counsel)

Petitioner submits that it is well settled under Georgia law and Federal law that the use of the word "shall" in this Statute makes it absolutely mandatory in that creates a right within the meaning of the due process clause and in this particular case

also violates the double jeopardy clause. See Georgia Code Annotated Section 102-102; State of Georgia V. Brantley, 147 Georgia Appeals 569, at 570-571; Garrison V. Perkins, 137 Georgia 744; Hicks V. Oklahoma, 100 S. Ct. 2227 (1980); Greenholtz V. Inmates of Nebraska Penal and Correction Complex, 442 U.S. 1, 47 LW 4581 (1979); Evans V. Dillahunty, 50 USLW 2352 (C.A. 8, decided 11-2-81). Petitioner submits that he had a constitutional right based upon his interest in life and liberty, in the trial court complying with the mandatory statute and that the Court, in failing to do so, established a waiver of his jeopardy for the death sentence under any aggravating circumstance other than (b)(7) and resulted in an implied acquittal of any such aggravating circumstance, other than (b)(7); particularly under the circumstances of this case.

As noted, in the first trial in March, 1978, the State and the Court submitted only Section (b)(7), i.e. "that the offense of murder was outrageously wantonly vile, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." (Tr. first trial - p. 578) Furthermore, as the following excerpt from the District Attorney's argument shows, before beginning the State's argument to the jury at the punishment phase of the first trial, and in the presence of the jury, the District Attorney called the attention of the Court to this provision and his legal and factual assertion that it was the only one that applied against Godfrey:

> "Mr. Perrin - Your Honor, may it please the Court, the same Statutes of this State that defines the offense of murder also provides for punishment.....of course, in order for the death penalty to be inflicted and in order to make the death penalty itself comply with the mandates of the Supreme Court of this Country, the State of Georgia, through its General Assembly, passed a Statute requiring that before the penalty could be inflicted, that is the penalty of death, that .....and this Section is 27-2534, one of the Criminal Procedure Codes.....(b) in all cases of other offenses for which the death penalty may be authorized, the Judge shall consider or he shall include in his instructions to the jury for it to consider, any mitgating circumstances or aggravating circumstances otherwise authorized by law, and any of the following statutory aggravating circumstances which may be supported by the evidence. Of course, it lists then 10 statutory aggravating circumstances, many of them are not involved in this case, in fact, there is only one of of the aggravating circumstances enumerated by the laws of this State which applies to this case, that is, the 7th enumerated under the general statutes which provide that the offense of murder, rape, armed robbery or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an

> in this case, it is not the contention of the State that the murder in this case involved torture, or that it involved an aggravated battery ..... and we submit to the Court that in this case the murder was outrageously or wantonly vile, that it was horrible, and inhuman and involved depravity of mind. If those things be found by the jury, then those are the things which authorize, and not only under the law since the imprisonment for life is the alternative, but they dictate the imposition of the penalty of death. Ladies and Gentlemen of the Jury, you have heard remarks that I have made to the Court regarding the law and of course, you will be authorized, and in order to and in the process of establishing a punishment which you feel is applicable in this case, it is necessary, mandated by the law, that you, as jurors, find some aggravating circumstance and make it a part of your verdict." (Tr. first case, pp. 568-570; emphasis supplied by counsel)

Under these circumstances, Petitioner submits that there was a binding waiver or forfeiture by the State, or an implied acquittal of any aggravating circumstance other than (b)(7) and that his resentencing to death in the second resentencing trial violated both the double jeopardy clause and the due process clause of the Fifth Amendment as applied to the States through the Fourteenth Amendment. See Hicks V. Oklahoma, supra; Bullington V. Missouri, supra; Greene V. U.S., 355 U.S. 184, 78 S. Ct. 221, 2 LE2d 199 (1957); Fong Foo V. U.S., 369 U.S. 141, 143, 82 S. Ct. 671, 672, 7 LE2d 629 (1962); Ashe V. Swenson, 397 U.S. 436, 90 S. Ct. 1189 (1970); Price V. Georgia, 398 U.S. 323, 90 S. Ct. 1757 (1970); Burks V. U.S., supra; Sanabria V. U.S., 437 U.S. 54, 98 S. Ct. 2170, 57 LE2d 43 (1978).

The Petitioner submits that because of the peculiar procedure allowed criminal cases in Georgia, whereby counsel may direct law to the Court, in order to invoke the Court's ruling thereon, prior to or during argument to the jury, the trial Court, in the first trial, is held to have affirmatively ruled, as a matter of fact and law, in the nature of a directed verdict of acquittal, that no aggravating circumstance other than (b)(7) "may be supported by the evidence." See GCA Section 27-2534.1(b). This would preclude the submission of another aggravating circumstance, in this case Section (b)(2), to a jury in any further proceeding even if Godfrey V. Georgia, supra, is not construed to fall within the Burks exception. It is long recognized in criminal trials in Georgia that counsel, including the State, make seek the Court's legal ruling prior to or at any time during argument. See GCA Section 24-3319; Weatherby V. State, 213 Georgia 188. This rule is reaffirmed in the first appeal of this case. Godfrey V. Georgia, 243

302 (1979). Thus, in Howell V. State, 65 Georgia 708, at 710-711 (1880), it was held as follows:

> "The fifth grant of error as corrected by the Judge is, that while counsel for the prisoner was arguing the case, he called the attention of the Court to this principle laid down in the headnote of the case of Granger V. State of Tennessee.....and reply to which the Judge stated in the presence and hearing of the jury, that this was not the law of Georgia. This Court has ruled that counsel may read and comment on the law to a jury in a criminal case, and we affirm that ruling. Counsel may, during the argument, invoke the opinion of the Judge upon any principle of law in the case, and it may be given at the time, or in the final charge; if, however, the mind of the Judge is made up and settled, we see no reason why he may not announce it at the time, and in the presence of the jury."

The Georgia Supreme Court had earlier held in McMath V. State, 55 Georgia 304, at 309, that:

> "Counsel, in their agrument, may read law to the Court in the hearing of the jury, or they may read law to the jury in the hearing of the Court, subject to the correction of the Court in its charge, which is to be considered as the authoritative exposition of the law for the consideration of the jury."

Therefore, Petitioner submits that the citation of authorities by the District Attorney to the Court in the first trial, in the presence of the jury prior to argument to the jury of GCA Section 27-2534.1(b) and the assertion that (b)(7) was the only aggravating circumstance that applied against Godfrey, invoked the trial Court's ruling which was given, not at that time, but in the Court's charge to the jury that Section (b)(7) was the only aggravating circumstance that applied or "may be supported by the evidence." It is interesting to note that the District Attorney's mistaken assertion that the finding of the aggravating circumstances "dictate the imposition of the penalty of death" was in fact corrected by the trial Judge in his charge:

> "And even though you find the existence of a statutory aggravating circumstance or circumstances you could recommend the life sentence." (Tr. first trial, p. 578)

As a result, Petitioner contends that this affirmative ruling by the trial Court in the first trial had, as a matter of law, equal dignity with a directed verdict of acquittal, or acquittal by the jury, of a death sentence under any aggravating circumstance other than Section (b)(7), including Section (b)(2) herein involved in the resentencing trial following remand.

This result is consistent with the civil law of res judicata to the effect that the non joinder or the splitting of a cause of action arising out of the same subject matter constitutes a waiver of any claim not asserted. See Milton V. Milton, 176 Georgia 88 (1932). See Justice Brennan's concurring opinion in Ashe V. Swenson, supra. In the principle of collateral estoppel, as embodied in the double jeopardy doctrine, is well recognized in Georgia criminal cases. Harris V. State, 193 Georgia 109 (1941); State V. Tate, 136 Georgia Appeals 181 (1975). This principle is also recognized in Georgia criminal statutes:

> "If the several crimes arising from the same conduct are known to the proper prosecuting officer at the time of commencing the prosecution and are within the jurisdiction of a single court, they must be prosecuted in a single prosecution except as provided in sub-section (c)." GCA Section 26-506(b); see also GCA Section 26-507(b).

These provisions are said to embrace the concept of res judicata and to prevent further prosecutions which could have been prosecuted under the former law in Georgia. See Capital Committee Notes on Criminal Code of Georgia, reported in Title 26 of Georgia Code Annotated, p. 57. This Court, of course, has held that the doctrine of collateral estoppel is embodied in the Fifth Amendment's double jeopardy clause and applicable to the States through the Fourteenth Amendment. Ashe V. Swenson, supra; Harris V. Washington, 404 U.S. 55, 92 S. Ct. 183, 30 LE2d 212 (1971). Therefore, Petitioner urges that the application of the rationale of Bullington V. Missouri, supra, to the bifurcated sentencing portion of capital trials under Georgia law construed together with the collateral estoppel doctrine and the joinder requirements of GCA Section 26-506(b), compels one to the conclusion that in the sentencing portion of a capital case, all aggravating circumstances, or theories or grounds supporting the death sentence, must be joined together in the first trial or be considered waived or forfeited in favor of the Defendant.

Furthermore, the State can not complain now that it and the trial Court erred in the first trial by not submitting Section (b)(2), even if it is assumed to be applicable, and thus should be entitled to another chance to forfeit Godfrey's life.

> "We have recently defined an acquittal as 'a resolution, correct or not, of some or all of the factual elements of the offense charged.' " Sanabria, 98 S. Ct. at 2182,83.

> ".....There is no exception permitting retrial once the defendant has been acquitted, no matter how egregiously 'erroneous', Fong Foo, supra, the legal rulings leading to that judgment might be." Sanabria, at 2184.
>
> "To hold that a defendant waives his double jeopardy protection whenever a trial court error in his favor on a mid-trial motion leads to an acquittal would undercut the adversary assumption on which our system of criminal justice rests,.....and would vitiate one of the fundamental rights established by the Fifth Amendment. The trial court's rulings here lead to an erroneous resolution in the defendant's favor on the merits of the charge. As Fong Foo V. U.S., supra, makes clear, the double jeopardy clause absolutely bars a second trial in such circumstances." Sanabria, at 2186. It follows that the petitioner, was not required to surrender his valid defense of former jeopardy as to any aggravating circumstance other than Section (b)(7) by virtue of the fact that he successfully appealed the death sentences against him under Section (b)(7). See Greene V. U.S., 355 U.S. 184, at pp. 191-194.

In conclusion, the Petitioner submits that the Capital Sentencing Statute is absolutely mandatory in its terms and that the State has had its chance to join all possible aggravating circumstances or claims for the death penalty. Therefore, "having received 'one fair opportunity to offer whatever proof it could assemble,' Burks V. U.S. supra, [and to seek the death penalty under any aggravating circumstance other than Section (b)(7) which may be supported by the evidence].....the State is not entitled to another." Bullington V. Missouri, 101 S. Ct. 1862. For these reasons also, this Writ should issue to fully review the matter and the remaining death sentence against the Petitioner thereupon vacated.

2.

Under the circumstances of this case, where there was no statutory authority for a remand for a resentencing trial, the second death sentences against the Petitioner violated the due process clause and was arbitrary and capricious in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

Petitioner submits that when the State ignores its own statutory procedures, particularly when seeking the death sentence, it amounts to due process violations of constitutional proportions. See Hicks V. Oklahoma, supra.

Ignoring the violation of the mandatory nature of Section 27-2534.1(b) requiring submission to the jury of all statutory aggravating circumstances that "may" be supported by the evidence is one instance involved here. When one considers the relatively routine situations where the mandatory "shall" has been given full force and effect, see State V. Brantley, 147 Georgia Appeals 569, as compared to the ultimate life or death nature of the Petitioner's case, one can readily see that to ignore the Statute is tantamount to a violation of the Constitution:

> "However, the Georgia Statute itself was approved only insofar as it was applied properly. Gregg V. Georgia, 428 U.S. 153, 198 (1975) (Stewart, Powell and Stephens, JJ.) Thus, the failure to adequately adhere to its strictures would appear to amount to error of constitutional dimensions in the present case and, indeed, generally. Gregg seems to leave no 'gap' between constitutional and statutory error. At the least, constitutional error would certainly develop where error under state law created the 'substantial risk' of the arbitrariness, which was prohibited by Furman found present in Stephens." Burger V. Zant, No. CV280-114, U.S. District Court, Southern District of Georgia, Brunswick Division, decided April 29, 1981, slip opinion p. 29. Judge Edenfield.

The addition of an aggravating circumstance not submitted to the jury in the first trial would also ignore Georgia Code Annotated Section 27-2503. This Georgia Statute establishing the sentencing hearing does not characterize that proceeding as a new trial. Rather the Statute describes such proceeding as the resumption of the defendant's trial:

> "In all cases in which the death penalty may be imposed and which are tried by a jury, upon a return of verdict of guilty by the jury, the Court shall resume the trial and conduct a presentence hearing before the jury. GCA Section 27-2503(b),(emphasis added).

Thus under Georgia law, all sentencing proceedings, whether original or products of reversal and remand, are second stages of the conviction trial and are by no means "clean slates". Furthermore, the prosecutor would be proscribed from changing his theory of aggravating circumstance after commencement of the original conviction trial, since he has a statutory obligation to provide prior notice of which statutory aggravating circumstance he relies upon. Georgia Code Annotated Section 27-2503(a). Petitioner submits that this proscription does not disappear simply because the original second stage of the trial may have been reversed, remanded and renewed and a new sentencing hearing. The prosecutor is still bound by the notice preceding the trial and the fact that the trial continues in a second stage after reversal, does not create a "clean slate" allowing the State to expand

its theory of aggravation at the second sentencing hearing.

Additionally, and more importantly, Petitioner contends that if the construction of Godfrey V. Georgia applied by the Georgia Supreme Court in Godfrey V. State, 248 Georgia 616 at 618 (1981), is correct, then under GCA Section 27-2503 the Georgia Supreme Court did not have statutory authority to remand to the trial court for a second resentencing trial. And, under the circumstances of this case, could only remand to the trial court for entry of life sentences. See GCA Section 27-2537(e)(2). Therefore, the remaining death sentences are void.

The Georgia Supreme Court's construction of Godfrey V. Georgia is, in effect, that the reversal of the death sentences in this Court was due to the Georgia court's failure, of constitutional proportions, to comply with its statutory sentence review duty under GCA Section 27-2537(c)(2). Petitioner submits that this fairly characterizes the Georgia Supreme Court's construction of the basis for the reversal in Godfrey V. Georgia:

> "The reversal in Godfrey V. Georgia, supra, was based on the premise that the Supreme Court of Georgia, in affirming a death sentence based on no more than a finding that the offense was outrageously or wantonly vile, horrible and inhuman, had allowed a standardless and unchannelled imposition of the death penalty in the uncontrolled discretion of a basically uninstructed jury. Godfrey V. Georgia, supra, at 429. 'There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence.' Id. 428. See Hance V. State, 245 Georgia 856, 268 SE2d 339, (1980); Cape V. State, 246 Georgia 520, 272 SE2d 487 (1980)." Godfrey V. State, 248 Georgia at 618.

Petitioner contends that, given the Georgia Supreme Court's interpretation of Godfrey V. Georgia as based upon its constitutional failure of its sentence review duty to keep Section (b)(7) within constitutional boundaries, this was not the type of error the Georgia Statute allows a remand for a resentencing trial upon. The Statute which allows the Georgia court to remand to the trial court for resentencing in death penalty cases where the conviction is sustained, is GCA Section 27-2503, which states in pertinent part:

> "If the trial court is reversed on appeal because of error only in the presentence hearing, the new trial which may be ordered will apply only to the issue of punishment." (Emphasis supplied)

Since error is defined in Black's Law Dictionary as "a mistake of the court in the trial of an action, a mistake of law or fact", it follows that, under Georgia Supreme Court'

view of Godfrey V. Georgia, there was no "trial court error" that caused the reversal but a sentence review error by the Georgia Supreme Court of constitutional proportions. Therefore, there was no statutory authority under the circumstances of Godfrey for the Georgia Supreme Court to remand for a resentencing trial, much less, under aggravating circumstances not submitted in the first case. The numerous cases where the Georgia Supreme Court has remanded for resentencing trials had to do with errors in the trial court, largely jury charge errors. See Fleming V. State, 240 Georgia 142, 240 SE2d 37; Hawes V. State, 240 Georgia 327, 240SE2d 833; Redd V. State, 242 Georgia 876. Therefore, under the Georgia court's view of the reversal in Godfrey V. Georgia, it should have been limited, on remand, to further proceedings under the sentence review statute. In other words, perhaps comb the record of the first trial to determine if there were facts not brought forward by the parties upon which the death sentences, consistent with this Court's opinion, could be sustained. The only other statutory authority for remand to the trial court, where a new trial is not granted, is for resentencing by the trial Judge of life sentences. GCASection 27-2537(e)(2). Petitioner submits that the proceedings in the trial court after remand without statutory authority are simply void and require vacation of the death sentences and resentencing to life sentences. See Miller V. State, 237 Georgia 557, at 559.

Another violation of the State's statutes in this proceeding also requires that the death sentences be voided. After the trial court denied the Plea of Former Jeopardy and refused to certify the question for interlocutory appeal, the Petitioner filed another Motion to enjoin or prohibit the State from a second resentencing trial on the same grounds. This was denied also, however, under Georgia law, the appeal of the denial of an injunction, or other extraordinary remedy, does not require a certificate from the trial judge. See GCA Section 6-701(a)(3). Thereafter, prior to the resentencing trial, Petitioner filed his Notice of Appeal on the denial of the injunction. This was ignored by the State and they proceeded onto the trial over counsel's objections.

As the dissent below in Godfrey V. State points out, this Court has recognized a right to interlocutory certiorari where double jeopardy is a non frivolous issue. U.S. V. Abney, 431 U.S. 651, 99 S. Ct. 2034. Ordinarily, a filing of a Notice of Appeal suspends jurisdiction for further proceedings in the trial court pending resolution in the

appellate court, under Georgia law. Since Georgia appellate procedure does not provide for an interlocutory appeal where double jeopardy is a non frivolous issue, and since the State ignored the Notice of Appeal filed in this case prior to the resentencing trial, the Petitioner's right to due process of law was accordingly violated and the proceedings after Notice of Appeal was filed should be rendered null and void. Hicks V. Oklahoma, 100 S. Ct. 2227, 2229 (1980).

In conclusion, Petitioner submits that allowing the resentencing trial where there was no statutory authority for it and in the face of numerous statutory violations related to Georgia procedure, violated the fundamental principles of procedural fairness which apply with no less force at the punishment phase of a trial in a capital case than they do in the guilt determining phase of any criminal trial. Gardner V. Florida, 430 U.S. 349; Greene V. Georgia, 99 S. Ct. 2151. It also flouts the well settled rule that state courts may not juggle their laws in an unpredictable and inconsistent fashion to the prejudice of federal constitutional rights. See, e.g. Staub V. Baxley, 355 U.S. 313, 320 (1958); NAACP ex. rel. Patterson V. Alabama, 351 U.S. 449, 454-458 (1958); NAACP V. Alabama ex. rel. Flowers, 377 U.S. 288, 293-301 (1964); Wright V. Georgia, 373 U.S. 280, 289-291 (1963). Also see Donahue, "Godfrey V. Georgia: Creative Federalism, the Eighth Amendment and the Evolving Law of Death", 30 Catholic University Law Review 13, 57 (1980).

3.

Georgia Code Annotated Section 27-2534.1(b)(2) as applied to the facts of this case is unconstitutionally vague and overbroad in violation of the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

Aggravating circumstance (b)(2), under which the Petitioner was sentenced to death on the resentencing trial after remand, is as follows:

> "The offense of murder, rape, armed robbery or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree." (Emphasis supplied)

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The ambiguity on the face of this aggravating circumstance has to do with the vagueness of the temporal aspect of the language "while the defendant was engaged in the commission....."; also raises the question of whether or not the words "another capital felony" actually cover mutliple murders.

Therefore, Petitioner submits that Section (b)(2) only applies where the accompanying capital felony is a "continuing offense" such as armed robbery or burglary. It is illogical, therefore vague, that one murder can be accomplished while one is "in the commisson" of another murder. This follows from the fact that the crime of murder is complete upon the death of the victim. The trial court declined to give this definition regarding murder which is referred to in another part of this petition. This is particularly so under the facts of this case. The Petitioner shot his wife from outside the trailer through the window with a shotgun in the forehead and the coroner's, medical examiner's and Sheriff's testimony all concurred that death of his wife was instantaneous. He then moved across the carport into the back door of the trailer while reloading the weapon, taking a swipe at his 12 year old daughter as she fled, entered the trailer and then shot Mrs. Wilkerson, the mother-in-law, in the head and that death also was instantaneous. Since the Georgia Supreme Court in its opinion has arbitrarily eliminated the death penalty in the murder of the wife, that leaves the murder of the mother-in-law, the second victim, standing.

Therefore, the Petitioner submits there is no logical way, under these facts, for the murder of Mrs. Wilkerson to have been committed while the Petitioner was engaged in the commission of the murder of Mrs. Godfrey because the murder of Mrs. Godfrey was complete upon her death, which was instantaneous, and which was prior to the Petitioner's entry into the trailer even though only moments apart.

This analysis lends credence to the proposition that Section (b)(2) does not reach the multiple murders situation, or in that respect is unconstitutionally vague. As this Court noted previously, "Georgia does not, as do some states, make multiple murders an aggravating circumstance as such." Godfrey V. Georgia, 446 U.S. 432, n. 15. Furthermore, as Justice White remarked in his concurrence in Gregg, the purpose behind Section (b)(2) is to allow the State to seek the death penalty "in witness-elimination" murders. 428 U.S. at 221 n. 10. This view of Section (b)(2) was also expressed by Judge Edenfield

of the Southern District of Georgia in the appendix memorandum to his habeas decision in Burger V. Zant, supra, p. 8. See also Donahue, Catholic University Law Review, supra, at pp. 42-43 n. 120.

Since the "other capital felony" mentioned in Section (b)(2) are rape, armed robbery, kidnapping, aggravated battery, burglary and arson in the first degree, Petitioner submits that in murder trials where the death penalty is sought under Section (b)(2),"another capital felony" would require proof of one of the others so named in addition to a murder. The phrase cannot unambiguously be construed to include the same offense, i.e., murder and murder, rape and rape, armed robbery and armed robbery, etc. Petitioner submits that the application of this Statute to the facts of his case renders it unconstitutionally ambiguous, vague and overbroad. Godfrey V. Georgia, supra; Smith V. Goguen, 415 U.S. 566; Grayned V. City of Rockford, 408 U.S. 104.

Petitioner submits, in conclusion, that the remedy for such situations would require the addition by the Legislature of another aggravating circumstance, (b)(11), making multiple murders an aggravating circumstance per se. In the meantime, the appellate courts of Georgia may not remedy the situation by an ambiguous and convoluted stretching of Section (b)(2) to include them.

4.

The charge of the Court was, as a whole, constitutionally deficient under the Fifth, Sixth, Eighth and Fourteenth Amendments because it provided no narrowing definition of the Statute nor any guidelines meaningful to a jury as to mitgating circumstances.

Petitioner's counsel submitted nine (9) jury charges to the trial Court in timely fashion, in writing, requesting that they be given to the jury. None were given verbatim and the Court charged the real substance of perhaps two or three of them. They are attached hereto as Appendix B.

Petitioner submits that this Court's recent opinion Eddings V. Oklahoma, 50 LW 4161 lends support to Petitioner's position that his Requests to Charge, particularly Request No. 1, so that the sentencing authority, i.e. the jury, as the Judge in Oklahoma,

would have some idea of what mitigating circumstances suggested by the evidence they could consider. In Furman V. Georgia, supra, this Court stated that the discretion of the sentencer "must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Gregg V. Georgia, 428 U.S. at 189. It is "quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations." Gregg, 428 at 193. "In death cases", doubts about the clarity of instructions should be "resolved in favor of the accused". Andreas V. United States, 333 U.S. 740, 752 (1948). See also Carlton V. Utah, 130 U.S. 83, 87 (1889). Furthermore, criminal defendants are entitled to instructions clear to a lay person as well as legal scholars. Taylor V. Kentucky, 436 U.S. 478, 484 (1978).

The trial court's written jury charge, which was allowed to go out with the jury during their deliberations, is attached hereto in Appendix C. The instructions leading to the death verdict against the Petitioner said nothing about the need to weigh the Petitioner's particular characteristics, as well as the specific circumstances of the crime. Furthermore, even though the term "mitigating" was given in its abstract definition, concrete examples of what the law regards as mitigating circumstances, and which were suggested by the evidence, were not provided, even though Defendant's Request to Charge No. 1 specified three that were arguably raised by the evidence. The jury also was not informed that it should weigh mitigating circumstances against aggravating circumstances. Furthermore, the jury was also given no guidelines as to what time frame is contemplated by aggravating circumstance (b)(2) in regard to defining the phrase "while in the commission of another capital felony."

The Georgia Supreme Court's earlier decisions regarding jury charges, have simply said that a non specific charge allows the jury to consider the characteristics of the individual and all the circumstances of the crime and any mitigating circumstance raised by the Defendant. Petitioner submits that this misses the point. This Court's cases have held that the Constitution requires the jury's attention is to be focused, by the law, on these matters. See Gregg, 428 U.S. at 189-190, 191, 192, 197, 199, 206; Profitt V. Florida, 428 U.S. 242 at 258; Lockett V. Ohio, 438 U.S. 586, 606; Woodson V. North Carolina, 428 U.S. 280 at 304. The decision of this Court in Eddings V. Oklahoma, supra, points out the weakness in the Georgia Supreme Court's approach regarding non

specific jury charges. This Court, in Eddings, remands to the Court in Oklahoma with instructions that certain types of mitigating circumstances must, as a matter of law, be considered. However, under the Georgia procedure, and under the jury charge given in this case, there is no guidance from the Court which can suitably narrow and focus the juror's discretion. A non specific charge that allows the jury to consider absolutely everything, while giving no concrete guidelines as to what the law contemplates as mitigating in terms of evidence in the particular case, in reality, assures that the jury of laymen will give little or no attention to mitigating circumstances simply because they do not know what one is or may be, in contemplation of the law. As Justice Marshall stated in his concurring opinion in Godfrey V. Georgia, 100 S. Ct. 1769,

> "The jury must be instructed on the proper narrow construction of the Statute. The Courts cases make clear that it is the sentencer's discretion that must be channelled and guided by clear objective and specific standards. "

Justice Marshall further noted that failure to instruct the jury properly would constitute a fatal constitutional defect that ".....could not be cured by the post hoc narrowing construction of an appellate court. The reviewing Court can determine only whether a rational jury might have imposed the death penalty if it had been properly instructed; it is impossible for it to say whether a particular jury would have so exercised its discretion if it had known the law." Id, at 1769. The plurality in Godfrey V. Georgia agreed that "the standardless and unchannelled imposition of death sentences in the uncontrolled discretion of a basically uninstructed jury in this case was in no way cured by the affirmance of those sentences by the Georgia Supreme Court." Id at 1765.

Petitioner submits that the abstract legal definition of the term "mitigation" in the charge is not sufficiently meaningful to a jury of lay persons to provide the required guidance. Appellant submits that more than the mere definition is required and that particular mitigating factors, relevant in light of the record, be called to the jury's specific attention as examples of what they could weigh against the aggravating circumstances which the Court did call to the jury's attention. This can be done without limiting their consideration to only those examples. See Request to Charge No. 1, Appendix B. This the law should do and should not be left to the Petitioner or his counsel whose assertions of what the "law contemplates as a mitigating circumstance

might be held suspect by the jury since the Court does not corroborate that in its charge and where the charge also states that the jury is to receive the law and charge from the Court. Furthermore, the Georgia Statute states flatly that the trial Judge "shall include" in his instructions "any mitigating circumstances.....which may be supported by the evidence." GCA Section 27-2534.1(b).

Petitioner submits that the Georgia Statute is obviously based on the Model Penal Code Section 201.3 (tentative draft No. 9-1959) which was referred to in Profitt V. Florida and in Gregg V. Georgia. Other States, following the author's comment from the Model Penal Code, have included a list of numerous mitigating circumstances in the Statute itself to be charged to the jury so that they could weigh mitigating as against aggravating circumstances. In Georgia, the Leglisature, in its wisdom, saw fit not to include those so that the bare Statute itself, as it has been applied, weighs much more heavily towards emphasizing the aggravating circumstances. Therefore, Petitioner submits that the Court's charge to the jury should correct that defect by narrowing the jury's discretion and fully informing it of what is contemplated by the law. Furthermore, it appears that this Court, in Godfrey V. Georgia, did weigh, and insist upon the importance of weighing such mitigating factors in order to avoid arbitrariness in capital sentencing condemned by Furman. Godfrey V. Georgia, 100 S. Ct. at 1767. And it is this very weighing process that the authors of the Model Penal Code considered to be "rationally necessary" in capital sentencing schemes. See Donahue, supra, pp. 58-59.

A copy of the trial Judge's form report required by the Georgia Supreme Court, and the Statute, to be filled out by the trial Judge when a death sentence has been imposed is attached hereto as Appendix D. In Part C-8 of the form report, the Judge is asked to check a list of eight (8) mitigating circumstances which may be supported by the evidence. These eight are verbatim borrowings from the Model Penal Code and also appear in the Florida and Missouri Statutes. See Bullington V. Missouri, supra. For this reason, since the Georgia Supreme Court has deemed it important to consider these factors after the death sentence has been imposed in its sentence review process, it clearly is a matter that should be brought to the attention of the sentencing authority, i.e. the jury. Ironically, this is precisely what Petitioner's counsel attempted to do in Defendant's Request to Charge No. 1. This Charge refers verbatim to the enumerated

mitigating circumstances found in Part C-8, Sections A, B, and G of the Trial Judge's Form Report and the Request to Charge directs that they might be considered by the jury but that did not limit the jury's consideration to them alone but that they could consider any others that they believe existed. Petitioner submits that the Defendant's Request to Charge No. 1 was a bare minimum of what should constitutionally be required to avoid wholly discretionary and capricious application of the death sentence. Petitioner further submits that the other Charges were all reasonable statements of the law as adapted to the death penalty sentencing and would be given in a normal criminal trial. Failure to give them merely demonstrates the arbitrary and essentially adversarial posture taken by the Georgia Courts in terms of the death penalty. Petitioner suggests that the Request to Charge on character evidence was particularly appropriate for a capital sentencing trial. It is in essence the usual character evidence charge given in most any criminal case where character evidence is offered. This combined with the fact that this Court's decisions have required that the jury's deliberations be focused on any mitigating circumstances regarding the accused or his background as well as the particular circumstances of the crime, failure to give this Charge was clearly erroneous. Petitioner submits in conclusion that since it is impossible to know what the jury would have done had it been properly instructed, then this sentence is not "rationally reviewable" and is therefore arbitrary and capricious in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

5.

The jury's consideration of mitigating circumstances was unconstitutionally restricted because the Court excluded evidence intended to demonstrate the rarity of death sentences in domestic murders.

Petitioner submits that his evidence, offered in mitigation, attempting to show the rarity of death sentences in domestic murder cases was relevant to "the circumstances of the offense" and should have been allowed into evidence before the jury in this case.

Greene V. Georgia, 99 S. Ct. 2150; Lockett V. Ohio, 438 U.S. 586, 604, 606; Eddings V. Oklahoma, 50 LW 4161.

The evidence, through Ms. Patsy Morris of the ACLU of Georgia, was to show that of approximately 44 cases involving domestic murders, where a life sentence was received, that had also been appealed to the Georgia Supreme Court, the State had waived the death sentence in all but 14 cases and in those 14 cases, the juries declined to give death. The abbreviated facts of these cases were before the Court as an Appendix to the Petitioner's Brief in the trial court in support of his Motion to Impose Life Sentences. They are the same as those docketed with this case in this Court and referred to in the Petitioner's Brief in Godfrey V. Georgia, 100 S. Ct. 1759 (1980). Petitioner submits that this rarity of the death sentence in true domestic murders is relevant to the circumstances of his case because the jury should not have to decide an ultimate life or death question in a vacuum without any notion of such a factor so commonly known in the criminal law community. Since the Georgia Capitol Sentencing Scheme requires the Georgia Supreme Court to compare cases surely it can not be objectionable to allow the actual sentencing authority to do the same where, as here, there is such a clear disproportionalty between death sentences in the type of murder charged and the great majority of such cases where the death sentence is either not sought or not granted. In its Appendix, the Georgia Supreme Court lists several allegedly "domestic murders" where death sentences were given but, as we shall see, they are dissimilar to the Godfrey case. A wide ranging hearing of mitigating circumstances is required by the Constitution, Gregg, Lockett, Eddings, and where the death sentence is indisputably rare in a certain type murder, a jury should not have to decide a matter of life and death without such information to weigh in its considerations.

6.

The trial court's unreasonable restriction of Petitioner's Counsel's voir dire concerning jurors' bias or predisposition toward the death penalty in murder cases, after having "death - qualified" them, violated the Fifth, Sixth, Eighth and Fourteenth Amendments to the U. S. Constitution.

Petitioner submits that the trial judge abused his discretion by limiting counsel's attempt to inquire into the jurors' personal attitudes of bias as towards the death penalty. The jurors had been death qualified under Witherspoon v. Illinois, 391 U.S. 510, and two jurors had been excused, over counsel's objections.

Counsel contends that if jurors are to be stricken for cause under the criteria in Witherspoon, then counsel, in voir dire, are entitled to know the jurors' personal attitudes or biases in favor of the death penalty on the theory that an aggressive proponent of the death penalty should be as disqualified as a juror as someone who meets the Witherspoon criteria. In Stroud v. United States, 251 U.S. 15 at page 20 (1919) this court indicated that a challenge for cause should have been sustained where a juror was in favor of nothing less than capital punishment in cases of conviction for murder in the first degree. Counsel submits that the necessary corollary to that ruling must be the right of counsel to ask individual questions designed to reveal the jurors' bias. If the questions cannot be asked, then such jurors cannot be challenged for cause or stricken by the use of peremptory challenges. This clearly constitutes an abuse of discretion. See also Crawford v. Bounds, 395 F 2d 297, 311 (1968); Cuevas v. State, 575 SW 2d 543 (1979) and Smith v. State, 573 SW 2d 763 (1977), Texas cases.

This Court has held that the discretion of a trial judge is limited to the demands of fairness. Aldridge v. United

States, 283 U.S. 308, 51 Supreme Court 470, 75 Lawyers Ed. 1054 (1931). Under Georgia Code Annotated Section 59-705, regarding the conduct of voir dire, it states in pertinent part as follows:

> " In all criminal cases both the State and the defendant shall have the right to an individual examination of each juror from which the jury is to be selected prior to interposing a challenge... and in such examination the counsel for either party shall have the right to inquire of the individual jurors examined touching any matter or thing which would illustrate any interest of the juror in the cause, including any opinion as to which party ought to prevail, the relationship or acquaintance of the juror with the parties or counsel therefor, any fact or circumstance indicating any inclination, leaning or bias, which the juror might have respecting the subject matter of the suit... " (Emphasis supplied)

In light of this statute, the questions sought to be posed to the respective jurors in this matter were not "general questions or technical legal questions", as was the case in the cases cited by the Georgia Supreme Court in affirming, but related directly to leaning or bias the juror might have respecting the subject matter of this suit, i.e. the death penalty.

During the process of voir dire, petitioner's counsel was beginning to get some very honest answers from some of the jurors about their attitudes toward the death penalty when the court, on its own motion, limited counsel's questions. After much argument and strife back and forth between counsel and the court, the court then recited verbatim from its jury charge concerning the law in Georgia regarding capital punishment simply ask the jurors in panel whether they could follow such a law. Thereafter, the trial judge restricted petitioner's counsel to a form question, which was arrived at by petitioner's counsel after many attempts were prohibited by the judge. And from that point on, petitioner's counsel got the usual perfunctor acknowledgment from the jurors that they could "follow the law".

Petitioner submits that this may have resulted in a more death prone jury than might otherwise have been obtained and violates the due process clause of the Fifth Amendment, his right to a fair and impartial jury under the Sixth Amendment and resulted in arbitrary infliction of the death penalty in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution.

7.

The death sentence against this Petitioner is arbitrary and unusual, considering all the facts and mitigating circumstances, and therefore, violates the Eighth and Fourteenth Amendments to the U.S. Constitution.

Petitioner submits that since the death penalty in domestic murder cases is such a rarity, in considering all the facts, background, relationship between the parties and other mitigating circumstances disclosed in the record, the death sentence against him is arbitrary and "unusual" in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

As a part of its sentence review duties under the Georgia statutory scheme, the Georgia Supreme Court is required to consider both the circumstances of the crime and of the man in determining whether it is appropriate that the death sentence be sustained. In doing so, the Georgia Supreme Court is required to list an Appendix of cases which it finds to be "similar" to the case under consideration. Conversely, petitioner submits that if the cases in the Appendix are substantially dissimilar from his case, then it follows that the death sentence in his case is disproportionate, unusual and arbitrary in violation of the Eighth and Fourteenth

Amendments and should be vacated.

The Georgia Supreme Court in upholding the latest sentence against the petitioner repeats and incorporates the Appendix from the first appeal, i.e. cases involving multiple murder. A brief look at those cases will demonstrate that they are not "similar" to the Godfrey case in the commonly used sense of the word when you consider all of the factual setting, background, mens rea and mitigating circumstances. Those cases are set out and distinguished in petitioner's brief to this Court on the first appeal, case number 78-6899 pages 45 through 47, and will not be repeated here.

Additionally, the Georgia Supreme Court in the Appendix to the latest decision submit seven so-called domestic murders alleged to be similar to Godfrey and, therefore, support the affirmance of the death sentences as not a "capriciously selected group of offenders". Gregg v. Georgia, 428 U.S. 153 , 199. However, the Georgia Court lists the Smith, Dix and Alderman cases which were distinguished in petitioner's brief to this Court on the first case at pages 43 through 45. The Smith case was a Section b 4 case committed for the purpose of receiving money where a man murdered his wife's ex-husband and the ex-husband's new wife with a shotgun so the killer's wife could collect insurance money for herself and children. Both Mr. and Mrs. Smith received the death penalty. In Alderman, Sections b 4 and b 7 were found where Alderman promised his accomplice that he would split the proceeds of his wife's insurance with him and where they beat Mrs. Alderman with a 12 inch crescent wrench, drowned her in the bathtub after attempting to strangle her and then dumped her out in a creek to make it look like her car had run off a bridge and she had drowned. Clearly, the killing for money takes these cases out of the category of domestic murders. In Dix v. State although serious questions have been raised about the accuracy of the facts reported in the decision, the decision shows that the victim was deliberately tortured by being cut

and carved as well as strangled to the point of eyes popping out prior to death. Dix also kidnapped the victim, his ex-wife, mother and sister. Also, clearly not similar to Godfrey.

In Mulligan v. State, re-examined in light of Godfrey, the evidence shows that the woman victim was shot three times before the fatal shot in the head in an execution style killing perpetrated for no other reason than to eliminate a witness to a murder of the male victim, the killer's brother-in-law seeking a divorce against the killer's sister. The court upheld it in light of Godfrey because of the serious physical abuse prior to death. The case also involved robbery of the victims. In Fair v. State, the defendant had killed one person over a money dispute and then later killed his accomplice at point blank range to eliminate him as a witness. In the addendum cited after Godfrey v. Georgia the Georgia Supreme Court reviewed Fair in light of that decision:

> " In Godfrey, the court found that Section b 7 was unconstitutionally applied in that case. We find material differences between Godfrey and the case under review which distinguish this murder from the murder in Godfrey and from other ordinary murders for which the death penalty is not appropriate." 245 Georgia at Page 880.

In Tyler v. State, the murderess killed her husband with rat poison after he had suffered off and on for a month or two from previous unsuccessful attempts that had put him in extreme pain and necessitated hospitalization.

> " The case is distinguishable from the recent U.S. Supreme Court case of Godfrey v. Georgia, supra. In Godfrey the victims were killed instanteously, and had been subjecting the perpetrator to emotional trauma prior to the killings. In the instant case, the evidence shows a pattern of intentional poisonings to the extent that, in each instance, the victim was rendered totally incapacitated and was caused to suffer agonizing pain."
> 247 Georgia at Page 125.

In Strickland v. State, the defendant killed three members of his girl friend's family, seriously wounding and crippling the girl friend, when she would not agree to marry him.

> " The present case is distinguishable from Godfrey v. Georgia... in numerous respects... It is not among those small "ordinary murders for which the penalty of death is not appropriate". Hance, supra, at Page 861. The homicides in the present case did not arise out of a husband-wife domestic dispute." 247 Georgia at 231.

In Gilreath v. State, a man killed his estranged wife and her father. Each victim was shot several times. The defendant contended that as to each murder the evidence didn't support Section b 7 which was the aggravating circumstance found in each.

> " In support of this contention, he relies on Godfrey v. Georgia, 446 U.S. 420, supra. We disagree with his contentions that this case is indistinguishable from Godfrey." 247 Georgia 814 at 838.

The case then goes on to make distinctions between Godfrey and Gilreath concerning the number and extent of the wounds suffered prior to death.

Petitioner submits that the Georgia Supreme Court cannot have it both ways. It cannot distinguish Godfrey from the cases listed in the Appendix when those cases were first affirmed in order that they be affirmed and then in affirming Godfrey after the second death sentence cite the cases as similar in support of upholding the death sentence in Godfrey. This flip flop procedure undermines the integrity of the sentence review process itself as conducted by the Georgia Supreme Court and, petitioner submits, should void the petitioner's death sentence as a violation of due process in that he was entitled to a proper sentence review to avoid capriciousness and arbitrariness of jury sentencing. Furthermore, when dissimilarity between Godfrey and those cases cited

as similar is considered along with the similarity between Godfrey and the large number of life sentence cases docketed with this court at the time of the first Godfrey appeal and set out in petitioner's brief, compels the conclusion that his death sentence is arbitrary and capricious and under the circumstances of the case and considering the mitigating circumstances, his death sentence for such a domestic murder case is such a rarity as to be "unusual" within the meaning of the Eighth and Fourteenth Amendments to the U.S. Constitution. Accordingly, it should be vacated.

## CONCLUSION

For all of the above reasons, this Writ of Certiorari to the Georgia Supreme Court should be granted, and upon review, the petitioner's death sentences should be vacated.

Respectfully submitted,

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